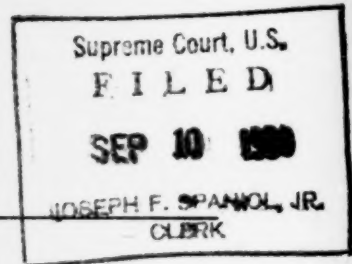


(2)  
No. 90-282



In The  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

FRANK PAVAO,

Petitioner

vs.

STATE OF NEW JERSEY,

Respondent

RESPONSE OF RESPONDENT TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEW JERSEY

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No. 90-282

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

FRANK PAVAO, PETITIONER

vs.

STATE OF NEW JERSEY, RESPONDENT

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ON APPEAL FROM THE SUPERIOR COURT OF  
NEW JERSEY, APPELLATE DIVISION

RESPONSE OF RESPONDENT TO PETITION  
FOR WRIT OF CERTIORARI



### STATEMENT OF THE CASE

The State submits the following is necessary to correct the misstatements or omissions contained within defendant's Statement of the Case.

When Trooper Meyer stopped the defendant, he immediately notified the defendant of the reason for the stop: defendant was weaving and traveling below the posted speed limit. R. 53-54. Further, the trooper did not insist that he had reason to believe defendant had been drinking. It was only after the stop, when the trooper had the opportunity to observe the defendant, that he suspected defendant was driving while intoxicated. R. 8 and 12.

Defendant's claim that he refused to take the breathalyzer test due to Trooper Meyer's untruthfulness is not based in fact. First,



it has been demonstrated that the trooper did explain the reasons for the stop. R. 49. Second, it was Trooper Linta, not Trooper Meyer, who attempted to give the defendant the required breathalyzer tests. R. 25 and 70. Further, defendant was even permitted to contact his attorney who was not available. R. 49.

The State objects to the extraneous facts regarding the two totally unrelated stops. However, should the Court consider this information, the cases do not prove defendant's contention: the stops were made solely because the driver had exited Bar Anticipation. In the first case, the driver admitted that he was, indeed, missing a side mirror; an equipment violation. R. 107. The second driver testified that he felt he had problems performing the requested balance



tests. R.113.

Additionally, the trooper was not staking out the bar, nor was he conducting an arbitrary and unauthorized roadblock. The trooper was merely traveling from Point A to Point B when he observed the defendant. R. 6-7.

The defendant's failure to comply with the provisions of Rule 14-h must be brought to the Court's attention. The defendant failed to demonstrate a federal question as to the interpretation of N.J.Rev. Stat. §39:3-40.





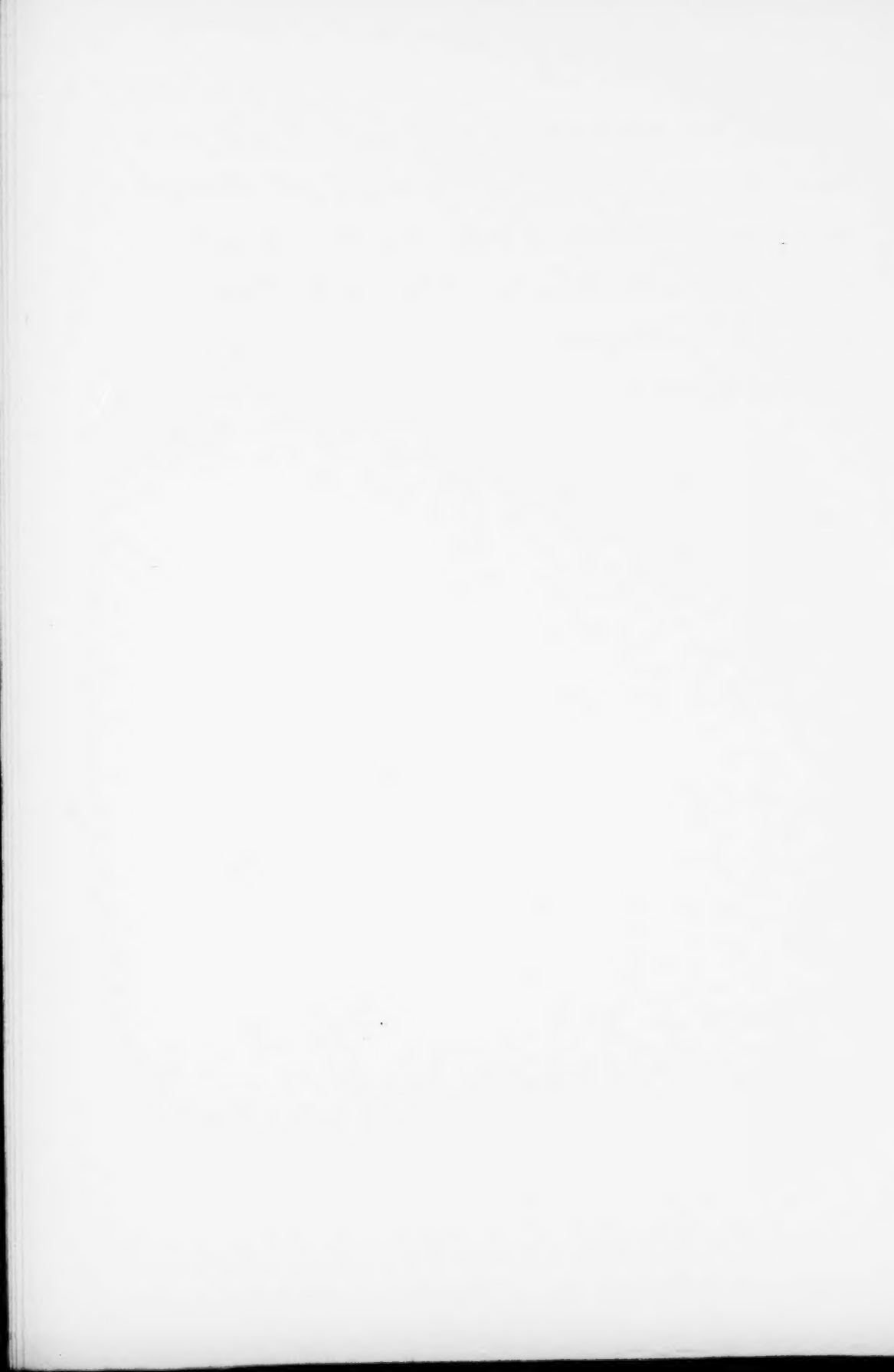
### SUMMARY

The defendant has failed to establish an adequate federal question as to the State Court's interpretation of N.J.Rev. Stat. §39:3-40. Therefore, the State submits that defendant has not established jurisdiction for the Court's review of this state statute decided on state grounds.

The State also submits that the facts satisfy the standard established in Delaware v. Prouse, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400 (1979), requiring reasonable and articulable suspicion that the vehicle or an occupant has violated the law to legitimize a motor vehicle stop. The New Jersey State Trooper articulated the bases for the stop: defendant wove, both in his lane and over the fog line, while traveling below the posted speed limit. These observations led the



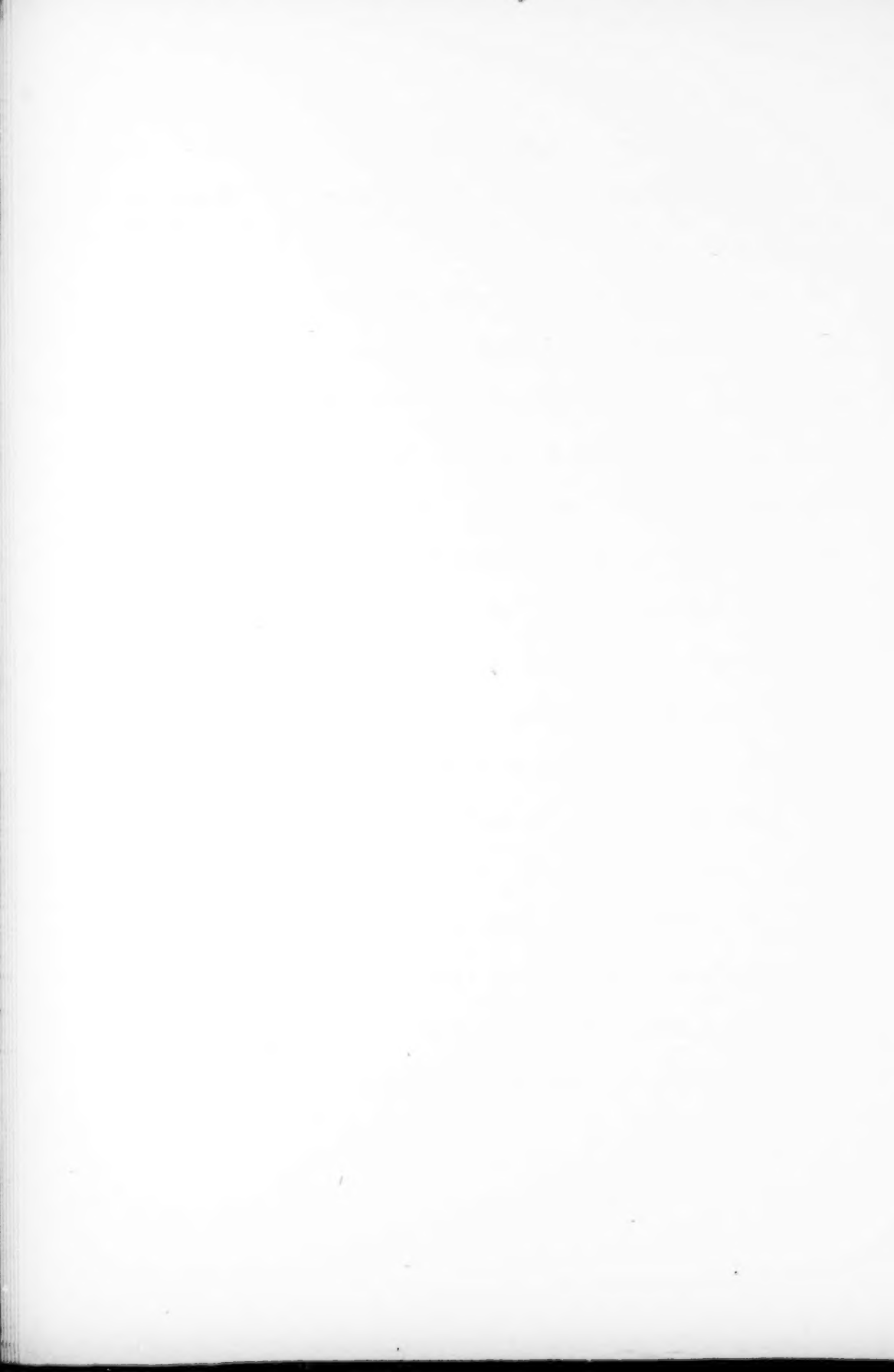
trooper to conclude that defendant may have been driving while intoxicated or driving carelessly. Based on these facts, the trooper clearly demonstrated the requisite reasonable and articulable suspicion to stop defendant's motor vehicle.



## ARGUMENT

I. Defendant fails to raise a federal question as to the application of N.J.Rev. Stat. §39:3-40.

Defendant seeks review of the United States Supreme Court under 28 U.S.C.S. §1257(a). This statute provides that the appellate jurisdiction of the United States Supreme Court may be invoked where the validity of a state statute is questioned as being repugnant to the United States Constitution and the judgment of the highest State Court upholds the validity of the statute. It is well-settled that review by the Supreme Court is not automatic. Zucht v. King, 260 U.S. 174, 175, 43 S.Ct. 24, 25 (1922). The Court has discretion to decline jurisdiction "whenever it appears that the constitutional question is not...substantial in character." Zucht v. King, 260 U.S. at



176, 43 S.Ct. at 25. Rule 17.1 The requirement of a substantial question applies to the Court's appellate jurisdiction under 28 U.S.C.S. §1257(a). Hicks v. Miranda, 422 U.S. 322, 344, 95 S.Ct. 2282, 2289 (1975).

The defendant's argument as to the improper review of N.J.Rev. Stat. §39:3-40 by the State Courts does not raise a federal question. Defendant's argument is based entirely on New Jersey Case Law, as is the Superior Court, Appellate Division, decision interpreting N.J.Rev.Stat. §39:3-40. Accordingly, the State respectfully submits that defendant's petition should be denied due to lack of jurisdiction. See also Rule 10.

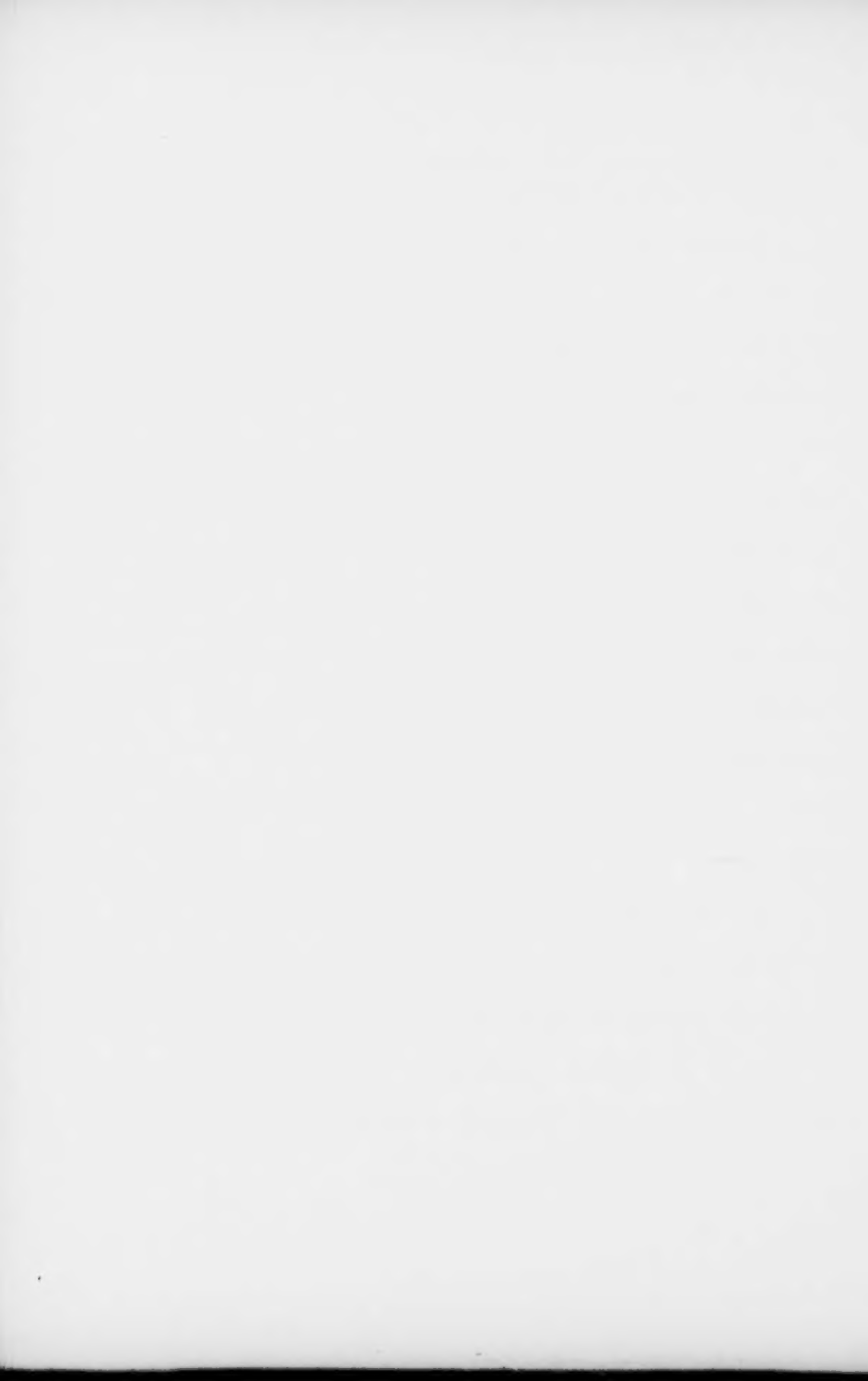




2. The stop of defendant's vehicle was constitutionally proper.

Defendant's remaining issues also fail to raise a constitutional question substantial in character. See Point I, supra. Defendant argues that the State failed to prove the validity of the initial stop of defendant's vehicle. The defendant relies upon Delaware v. Prouse, 440 U.S. 468, 99 S.Ct. 1391 (1979), to support his contention. The State submits that the standard set forth in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, is the appropriate one, but differs from the conclusion reached by defendant upon application of the law to these facts.

In Delaware v. Prouse, 440 U.S. at 663, 99 S.Ct. at 1401, this Court established the minimum standard necessary to make the stop of a motor vehicle proper under the Fourth Amendment to the United States Constitution.



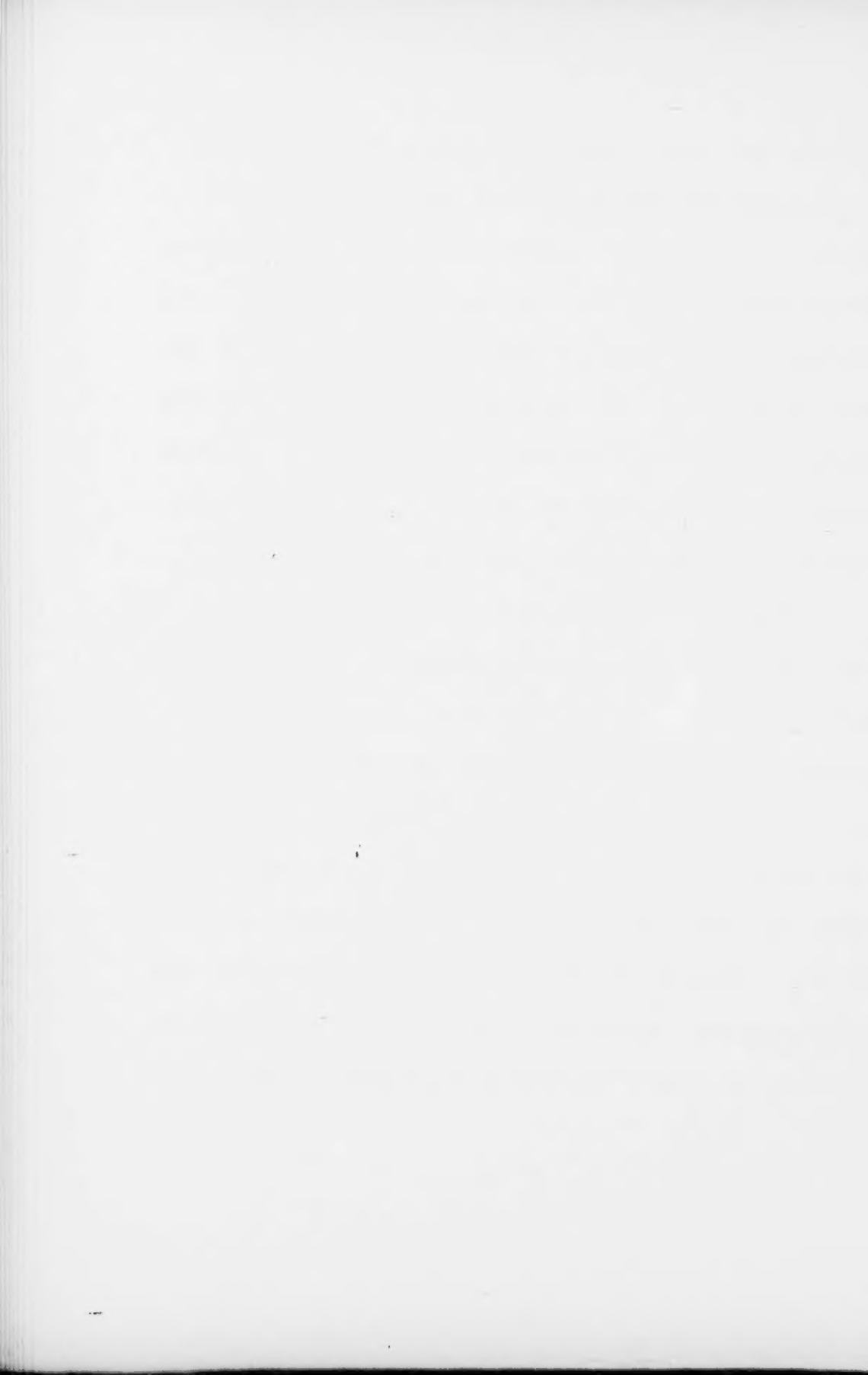
The police officer must have "at least a reasonable and articulable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." Id. at 663, 99 S.Ct. at 1401.

The State submits that these facts provide an objectively reasonable basis to stop defendant's vehicle. "The vehicle was traveling at [a] low rate of speed, was weaving and, on at least two occasions, crossed over the fog line separating the traveled portion of the highway from the shoulder." State v. Pavao, 239 N.J.Super. 206, 209, 570 A.2d 1295, 1286 (1990). Delaware v. Prouse does not require that the officer explicitly state the specific crime of which he suspects a defendant to be in



violation, nor does it require that the violation be demonstrated beyond a reasonable doubt. In fact, the officer is not even required to have probable cause as the defendant repeatedly opines. The standard set by this Court is reasonable and articulable suspicion of violation of the law. If the Court had intended to require probable cause, the Court would have used that term.

Further demonstration of defendant's confusion regarding the necessary standard of proof is evidenced by the import defendant places upon the fact that defendant was found not guilty of drunk driving or careless driving. The State counters that this fact has no bearing upon the propriety of the stop. Facts which establish reasonable and articulable suspicion do not automatically establish proof beyond a reasonable doubt, or



even probable cause in some cases.

Applying the proper standard illustrates the validity of the stop. "The erratic nature of the movement of the vehicle provided an articulable and reasonable suspicion that defendant was driving carelessly, N.J.S.A. 39:4-97, or while under the influence of alcohol, N.J.S.A. 39:4-50." State v. Pavao, 239 N.J.Super. at 209, 570 A.2d at 1287.

Accordingly, as the State Courts correctly applied the appropriate federal standard, the State submits that the question raised is not of such substantial character as to require this Court's review.



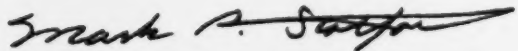


CONCLUSION

For the reasons and authority set forth, the State submits that defendant has failed to satisfy the criteria necessary for a Writ of Certiorari. Therefore, the State respectfully requests that defendant's Writ of Certiorari be denied.

Respectfully submitted,

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MPS:PQ:da